Supreme Court, U.S.
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No. 94-1638

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Jessie Shiow-Jiuan Ho, *Petitioner,*

v.

The State Bar of California, *Respondent.*

To Petition for Writ of Certiorari
to the Supreme Court of
the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the California Supreme Court's determination that recusal was not appropriate in light of petitioner's highly speculative and conclusory allegations of bias a denial of Due Process?

2. Whether the California Supreme Court's order of discipline against an attorney based, in part, on a stipulation that was properly before the Court, raises an important federal question which should be decided by this Court?

3. Whether there is an unconstitutional delegation of judicial power to the State Bar Court where all actions of the State Bar Court in attorney discipline matters are subject to the independent plenary review of the California Supreme Court?

4. Whether petitioner's vague and unsupported claims of financial interest on the part of State Bar Court judges and trial counsel raise an important federal question which should be decided by this Court?

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STATEMENT

Petitioner, Jessie Shiow-Jiuan Ho, ("petitioner") is an attorney who has been suspended from the practice of law by Order of the California Supreme Court following a disciplinary proceeding in State Bar Court in which petitioner entered into a Stipulation as to Facts and Disposition ("Stipulation") with respondent the State Bar of California ("the State Bar"). Petitioner seeks a writ of certiorari to review the California Supreme Court's Order, issued March 16, 1995, denying her motion for recusal, petition for review and application for a stay of the order of suspension.

Petitioner first argues that a writ of review should be granted because the California Supreme Court's recusal procedures, or lack thereof, "pose due process problems". (Petition, pp. 6-7.) Petitioner next argues that, due to the "partisan" nature of the California Supreme Court, recusal of the California Supreme Court

justices in this case was and is required. (Petition, pp. 8-9.) Petitioner alleges that she withdrew consent to the Stipulation before it was approved by the State Bar Court and forwarded to the California Supreme Court. (Petition, p. 4.) Based, in part, on this withdrawal of consent, petitioner contends that the State Bar Court Order approving the Stipulation transmitted to the California Supreme Court on January 11, 1995 should not have been approved by that Court. (Petition, pp. 4-5, 9-11.) Petitioner further argues that her consent to the Stipulation was obtained without full disclosure by both State Bar trial counsel and the State Bar Court hearing judge, of the nature and extent of their financial interest in securing such Stipulation. (Petition, p. 5.) Petitioner also contends that the Stipulation should be voided because she was not notified, in advance, of the amount of costs to be assessed in connection with her case. (Petition, pp. 11-14.)

As will be shown more fully below, petitioner's arguments with respect to the "partisan" nature of the California Supreme Court are groundless, and recusal was not appropriate in her case. Petitioner's contentions regarding the validity of the Stipulation are equally without merit as (1) petitioner was advised that she would be required to pay costs associated with the State Bar's prosecution of her case from the outset; (2) petitioners's attempt to withdraw her consent to the Stipulation was untimely, insufficient and legally ineffective; and (3) petitioner's allegations regarding the State Bar Court's and State Bar employees' undisclosed financial interest in the outcome of her case are frivolous, without any factual basis, and entirely without merit.

A. Procedural History

Petitioner was admitted to the State Bar of California on December 11, 1989. In November of

1994, prior to the filing of a Notice to Show Cause, petitioner entered into a Stipulation as to Facts and Disposition with the State Bar concerning allegations of misconduct against her. Without making any corrections, additions or deletions, Petitioner signed the Stipulation on November 15, 1994 and mailed it back to the State Bar. On November 16, 1994, trial counsel for the State Bar signed the Stipulation on behalf of the State Bar.

Pursuant to former rules 405-407 of the Transitional Rules of Procedure of the State Bar[1], the signed Stipulation was submitted to the State Bar Court for approval. On November 21, 1994, the hearing judge entered an Order approving the Stipulation, and recommending the disposition to the California Supreme Court. In accordance with the Stipulation, the Order

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[1]This is a reference to the rules which were in effect between May 27, 1989 and September 13, 1992.

further approved an award of costs to the State Bar pursuant to Business and Professions Code section 6086.10. The proof of service attached to the Order indicates that it was served on both State Bar trial counsel and petitioner at her official address of record.

Although petitioner had fifteen (15) days within which to make a motion to withdraw or modify her consent to the Stipulation for good cause, petitioner did nothing.[2] After expiration of the fifteen (15) day deadline, petitioner apparently sent letters by certified mail to the State Bar Court hearing judge and California Supreme Court Chief Justice Lucas requesting the addressees to "[p]lease withhold acting upon my

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[2]Rule 407(c) of the Transitional Rules of Procedure of the State Bar provides as follows: "Once adopted by the hearing judge, the stipulation shall bind the parties in the proceedings to which it relates unless withdrawn or modified with approval of the judge, upon good cause shown and upon application of a party made within fifteen (15) days of service of the order approving stipulation."

signature on the Stipulation as to Facts and Disposition until you hear from me. . . "[3] In accordance with rule 407(b) of the Transitional Rules of Procedure of the State Bar, the Order and the related record containing the Stipulation was filed with the Clerk of the California Supreme Court on January 11, 1995.

On January 26, 1995, petitioner filed a petition in the California Supreme Court, seeking relief from the Stipulation. Petitioner requested the Court to recuse itself from considering the matter and refer it to an appellate panel to resolve the issues posed in her petition. In addition, she requested a stay of the proceedings with respect to the Stipulation until the issues raised in her petition had been resolved.

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[3]In addition, petitioner alleges that she sent two letters dated December 8, 1994 by regular mail to the same addressees. Because State Bar trial counsel was not served with copies of any of these letters, there is no way to verify this allegation.

The California Supreme Court denied the petition, application for a stay, and motion for recusal by an Order issued March 16, 1995 in case number S044354. Petitioner now seeks a writ of certiorari to review the California Supreme Court's Order.

B. Statement of Facts

The following is a summary of the facts as set forth in the Stipulation.

In approximately mid-July of 1990, petitioner began working in a law office set up by non-attorney Chung Dinh "Tony" Tran specializing in personal injury law.[4] At some point during the end of September in 1990, petitioner became aware of some improprieties regarding the manner in which Tran was handling the trust account set up by petitioner. In October of 1990,

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[4]Although not a lawyer, Tran has been involved with several other attorneys who have been disciplined by the State Bar. He is currently serving a prison sentence as a result of his law office operations.

petitioner discovered that Tran had stolen trust account checks and forged her signature on them. In November of 1990, petitioner closed both her trust account and her general account and opened two new accounts. Eventually, Tran gained access to these accounts and again forged petitioner's signature on checks issued from the trust account. The general and trust account records show that client trust funds were misappropriated from both the old and new accounts. Although petitioner did not commit the misappropriation, she later became aware that certain medical care providers had not been paid for services provided to clients whose cases had been settled. Petitioner paid these medical care providers.

In December of 1990, Tran closed and moved the office without notifying petitioner. Nevertheless, petitioner located the new office and requested one of the employees to provide her with substitution of attorney forms for the cases petitioner had handled. The

employee told her to leave and threatened to call the police. Petitioner later made contact with one of the attorneys who had taken over the practice. This attorney promised to send substitution of attorney forms to petitioner, but petitioner never received substitutions for all of her former cases. In January of 1991, after petitioner detected the misuse of her new trust account, she closed both of the new accounts. Petitioner worked for Tran for a total of approximately four months.

Petitioner stipulated to the following acts of professional misconduct:

1. Petitioner formed and operated a partnership for the practice of law with a non-lawyer in wilful violation of Former Rule of Professional Conduct 1-310.[5]

2. Petitioner failed to adequately supervise non-

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[5]All rules referred to in numbered paragraphs 1-3 were in operation between May 27, 1989 and September 13, 1992.

attorney personnel working in her office and thereby failed to perform competent legal services in violation of former Rule of Professional Conduct 3-110.

3. Petitioner failed to adequately supervise and monitor client funds pertaining to her law office and failed to supervise and monitor office staff with respect to their handling of client funds, with the result that client settlement drafts were not deposited into her trust account and other funds were misappropriated in wilful violation of former Rule of Professional Conduct 4-100(A).

The Stipulation and State Bar Court Order issued thereon recommended that petitioner be suspended from the practice of law for a period of two (2) years, that the execution of the suspension be stayed, that petitioner be placed on probation for one (1) year with conditions, including actual suspension for forty-five (45) days. The California Supreme Court approved these

recommendations in an Order issued March 16, 1995. Petitioner is currently serving the 45-day actual suspension.

REASONS FOR DENYING WRIT

A. The California Supreme Court's Determination that Recusal Was Not Appropriate and Its Subsequent Order Imposing Discipline Does Not Raise Due Process or Important Federal Questions

Review on a writ of certiorari is not a matter of right and will be granted only where there are special and important reasons. Rule 10, Rules of the Supreme Court of the United States. None of the reasons set forth in rule 10 are available here. There is no decision by a federal appellate court (rule 10(a)); the California Supreme Court decision at issue does not conflict with that of any other state court of last resort or of a federal appeals court (rule 10(b)); and the California Supreme

Court decision at issue does not decide an important federal question of federal law that should be decided by this Court, nor is it in conflict with any decision of this Court (rule 10(c)).

The absence of a *mandatory* statutory recusal mechanism applicable to the justices of the California Supreme Court does not make a showing of bias unnecessary. As in any case, it was entirely appropriate for the California Supreme Court to be given the opportunity to decide the issue of alleged bias of its individual members for itself. Flangas v. State Bar of Nevada (9th Cir. 1981) 655 F.2d 947, 950.

B. Petitioner's Claims Regarding the "Partisan" Nature of the Supreme Court Are Groundless and Recusal is Unnecessary

Petitioner contends that the California Supreme Court is biased in favor of the State Bar, and that it cannot therefore carry out, in a disinterested manner, its

adjudicative role in reviewing and making final determinations with respect to the discipline of attorneys in the State of California. (Petition, pp. 6-8.) In support of these contentions, petitioner argues that the California Supreme Court's role in appointing State Bar Court judges and awarding costs to the State Bar are in conflict with its adjudicative role. (Petition, p. 7, fn. 2.) Petitioner cites this Court's decision in Aetna Life Insurance Co. v. LaVoie (1986) 475 U.S. 813 for the proposition that, because of this supposed conflict, the California Supreme Court should have recused itself from reviewing the State Bar Court's approval of the Stipulation and recommendation of discipline in her case.

Petitioner's reliance on Aetna, supra, is unavailing. In Aetna, the Court held that the Due Process Clause of the Fourteenth Amendment required that an Alabama Supreme Court justice be recused for bias in circumstances where the justice had a " . . .

direct, personal, substantial, pecuniary interest . . ." in the outcome of a particular case. Aetna Insurance Co. v. LaVoie, supra, 475 U.S. at 822. In the instant case, rather than presenting evidence to demonstrate a direct, personal, substantial pecuniary interest in her case, petitioner merely proffers highly speculative and conclusory allegations of bias.

C. **Petitioner's Attempt to Withdraw Her Consent to the Stipulation Was Insufficient, Untimely and Ineffective**

Former rule 407(c) of the Transitional Rules of Procedure of the State Bar[6] provided as follows: "Once adopted by the hearing judge, the stipulation shall bind the parties in the proceedings to which it relates unless

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[6]This rule corresponds with, and is essentially the same as, current rule 135(b) of the Rules of Procedure of the State Bar (effective January 1, 1995). The Rules of Procedure of the State Bar are published in volume 23, West's Annotated California Codes (Rules of Court) part 2.

withdrawn or modified with approval of the judge, upon good cause shown and upon application of a party made within fifteen (15) days of service of the order approving stipulation." (Emp. added.) Because petitioner did not apply to the State Bar Court hearing judge to withdraw or modify the stipulation for good cause, the hearing judge had no choice but to enter an Order approving the Stipulation and submit it to the California Supreme Court. Although petitioner appears to have had second thoughts about the Stipulation, and apparently attempted to communicate her feelings to the hearing judge after the fifteen (15) day time deadline, her attempt had neither practical nor legal effect on the binding nature of the Stipulation.

Not only was petitioner's letter sent after the

fifteen (15) day time deadline,[7] it was also not in the proper form of a motion to withdraw consent, and did not specifically state that she wished to withdraw her consent to the Stipulation. Rather, the letter appears to seek an abatement of the proceedings until the court "hear[s] from [her]". Aside from the vagueness of her request, petitioner's letter gave no hint of what her "good cause" might be for seeking this abatement. In addition, State Bar trial counsel was never served with copies of any of petitioner's letters.[8]

Therefore, the State Bar Court hearing judge's decision to submit an Order approving the Stipulation to

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[7]The deadline to make a motion based upon a showing of good cause to withdraw consent to the Stipulation expired December 11, 1994. Petitioner's certified letter was apparently received December 14, 1994.

[8]This is a violation of Rule of Professional Conduct 5-300(B)(4). The Rules of Professional Conduct are published in volume 23, West's Annotated California Codes (Rules of Court), part 2.

the California Supreme Court was entirely correct under the circumstances.

D. Petitioner's Claims Regarding Conflict of Interest and Financial Interest of the Hearing Court Judge and Trial Counsel are Frivolous, Unsupported by any Evidence, and Wholly Without Merit

Petitioner next argues that because the State Bar Court failed to disclose its secret financial interest in the outcome of her case, her consent to the Stipulation was "uninformed" and the Stipulation should be voided. (Petition, pp. 11-14.)

Complimenting the lack of relevant legal authority supporting her theory, petitioner presents no facts to demonstrate that an undisclosed financial interest exists. She relies instead on vague, conclusory and false allegations concerning the structure and function of the State Bar disciplinary system. Specifically, petitioner

contends that the State Bar Court is operated from funds obtained, in the form of costs, from respondents in disciplinary proceedings. (Petition, p. 7, fn. 2.) This is perhaps a reference to the fact that in 1986, the California Legislature provided that costs of disciplinary proceedings shall be imposed as part of any order imposing discipline of a public reproval, suspension or disbarment. Cal. Bus. & Prof. Code § 6086.10. The fact that disciplinary costs are collected and paid into the treasury of the State Bar to help finance its regulatory activities in no way supports petitioner's assertions that these funds are used for the State Bar Court Judges' private purposes. The salaries of State Bar Court Judges are set by statute, (Cal. Bus. & Prof. Code § 6079(d)), and are not dependent, to any extent, upon the collection

of disciplinary costs.[9]

D. As A Matter of Law, There Is No Unconstitutional Delegation of Judicial Power To The State Bar Court

Petitioner next argues that in addition to the undisclosed financial interests of State Bar employees in the outcome of discipline cases, the disciplinary system itself is unconstitutional. (Petition, pp. 12-13.) Again, this argument misrepresents the role of the California Supreme Court vis a vis the State Bar and the State Bar Court.

The State Bar of California is a public corporation established in the judicial branch of government for the

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[9]It should be noted that monies collected from attorneys found culpable of misconduct comprise only a tiny fraction of the State Bar's treasury. The revenue received from disciplinary costs assessed against attorneys, as a percentage of total annual membership fees collected, ranged from .1% to .7% of the total annual membership fees collected in the calendar years from 1990 to 1994.

purpose of performing governmental functions in the administration of justice. Cal. Const. Art. VI, § 9; Cal. Bus. & Prof. Code, § 6001. Historically, the State Bar has acted as the administrative arm of the California Supreme Court in matters related to attorney discipline. Rosenthal v. Justices of the Supreme Court of California (9th Cir. 1990) 910 F.2d 561, 566; Saleeby v. State Bar (1985) 39 Cal.3d 547, 557. The State Bar has statutory authority to prosecute attorney disciplinary proceedings (Cal. Bus. & Prof. Code, §§ 6040, 6043, 6044, 6090, 6092.5, 6094.5) and the State Bar Court has separate statutory authority to adjudicate such proceedings. Cal. Bus. & Prof. Code, §§ 6079.1(a), 6086.5, 6086.65(d). Within this framework, the California Supreme Court retains inherent and exclusive plenary power to control all matters related to attorney discipline. Jacobs v. State Bar (1977) 20 Cal.3d 191, 196; Cal. Bus. & Prof. Code, § 6087; Cal. Rules of Court, rule 951(g). Indeed,

"[f]inal authority for disbarment [and suspension] rests not with the bar but with the state Supreme Court." Rosenthal, supra, 910 F.2d at 566-567.

Two California Supreme Court decisions, Lebbos v. State Bar (1991) 53 Cal.3d 37 and Conway v. State Bar (1989) 47 Cal.3d 1107, expressly rejected the argument that the California disciplinary system represents an improper delegation of judicial authority in violation of the California Constitution. Both cases were decided during the pre-1989 disciplinary system in which the State Bar Court was comprised of volunteers appointed by the State Bar Board of Governors. However, both decisions are highly relevant and applicable to the structure of the present system, in which full-time State Bar Court judges are appointed directly by the California Supreme Court. Cal. Bus. & Prof. Code § 6079.1. The main thrust of these decisions is that an attorney disciplinary system over

which this Court maintains ultimate authority and control cannot be unconstitutional. As the California Supreme Court stated in Lebbos, ". . . the judicial power in disciplinary matters remains with the [Supreme] Court, and was not delegated to the State Bar." Lebbos v. State Bar, supra, 53 Cal.3d at p. 48. (Emp. added.) The State Bar Court as presently constituted remains subject to the ultimate authority of the California Supreme Court.[10]

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[10]All actions of the State Bar Court in attorney discipline matters are subject to the independent, plenary review of this Court. (Cal. Bus. & Prof. Code §§ 6082, 6083, 6087, 6100; Rule 951(g), California Rules of Court.) If no timely petition for review is filed, the recommendation of the State Bar Court for disbarment or suspension is filed as an order of the Supreme Court. (Rule 953(b), California Rules of Court; see also Cal. Bus. & Prof. Code § 6084.) As such, the Court issues its own order which is filed by the Clerk, incorporating the recommendation of the State Bar Court.

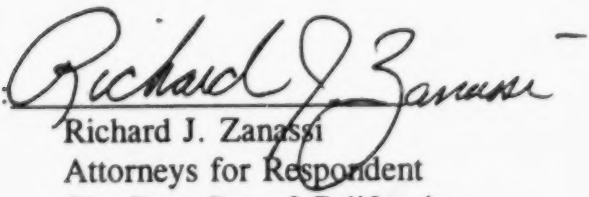
CONCLUSION

Petitioner has failed to present any facts to support her request for a writ of certiorari, nor has she demonstrated that any of the actions taken by respondent in connection with her case were improper. For these and all of the foregoing reasons, respondent the State Bar respectfully requests this Court to deny the petition for writ of certiorari.

DATED: May 5, 1995

Respectfully submitted,

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